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No. 91-2077

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

COLLEEN HAYES, NATHANIEL CALDWELL and
TOM ALLISON,

Petitioners,

vs.

GREGG FITZGERALD BAILEY and
LIZZIE SHIRLEY BAILEY,

Respondents.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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Attorney For Respondents

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QUESTIONS PRESENTED

I. WHETHER THE COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FAILED TO APPLY THE CORRECT STANDARD IN DETERMINING WHETHER THE DEFENSE OF QUALIFIED IMMUNITY WAS PROPERLY DENIED TO PUBLIC OFFICIALS IN CONNECTION WITH AN ALLEGED DENIAL OF PROCEDURAL DUE PROCESS.

II. WHETHER A PUBLIC OFFICIAL'S DEFENSE OF QUALIFIED IMMUNITY SHOULD BE SUBMITTED TO A JURY WHEN IT CANNOT BE RESOLVED BEFOREHAND BY A MOTION FOR SUMMARY JUDGMENT BECAUSE OF DISPUTED MATERIAL FACTS.

PARTIES TO THE PROCEEDINGS BELOW

In addition to the parties named in the caption, the parties to the proceedings below included the Board of County Commissioners of Alachua County, Florida, Eugene Whitworth, State Attorney of the Eighth Judicial Circuit of Florida, in his individual and official capacities, L.J. "Lu" Hindery, Sheriff of Alachua County, Florida, in his individual and official capacities, City of Gainesville, Florida, John Stanton Tileston, Sr., Farnell Cole, Charles Jerkins, Spencer Mann, Stephen Garrahan, Gary Brown and James Strauss.

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Respondents Gregg Fitzgerald Bailey and Lizzie Shirley Bailey respectfully pray that this Court deny the Petition For Writ of Certiorari to review the questions Petitioners seek to have reviewed from the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered on March 31, 1992.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 956 F.2d 1112. This

opinion is reproduced in Petitioners' Petition, and in Respondents' related Petition For Writ Of Certiorari, No. 92-3. There was no reported opinion of the United States District Court for the Northern District of Florida; its unreported pretrial order ruling on various pretrial motions is reproduced in Petitioners' Petition and in Respondents' related Petition For Writ of Certiorari.

JURISDICTION

The judgment of the Court of Appeals was entered on March 31, 1992. A timely Petition For Rehearing was denied on June 1, 1992. The jurisdiction of this Court is invoked under 28 U.S.C.A. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section I of the Fourteenth Amendment provides: "nor shall any State deprive any person of life, liberty, or property without due process of law."

The Civil Rights Act of 1871, 42

U.S.C. §1983 (1982), states in pertinent part:

> Every person, who under color of any statute, ordinance, regulation, custom, or usage, of any State * * *, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

Petitioners' summary statement of the case omits the factual background that underlies the rulings of the Courts below on the issues raised in Petitioners' Petition and deprives it of validity. Respondents have set forth the detailed facts in their Petition For Writ Of Certiorari (No. 92-3) and will summarize them here.

Respondent GREGG F. BAILEY (hereinafter referred to as BAILEY) was in

the employment of the Alachua County, Florida, Department of Corrections (hereinafter referred to as ACDC) as a corrections officer on the morning of May 14, 1987. BAILEY was a permanent employee with constitutionally protected property interests in his job.

Petitioner CALDWELL was ACDC Director on that date and later became County Director of Public Safety with supervisory authority over the ACDC Acting Director. Petitioner ALLISON was ACDC Assistant Director on May 14, 1987 (Assistant to CALDWELL) and later became ACDC Acting Director under CALDWELL's supervising authority as Public Safety Director. At all times HAYES was County Personnel Manager. ALLISON testified that he took every job action taken as ACDC assistant or acting Director in respect to BAILEY after prior consultation with and approval of CALDWELL and HAYES.

On April 22, 1987 a jail break was attempted at ACDC and failed. ACDC officials immediately determined who was involved and brought charges against the perpetrators. BAILEY was not implicated. After this, one of the inmates who attempted the escape in connection with his requests for favorable treatment from ACDC authorities, made vague statements that a prison guard might have been involved in the escape. Respondent BAILEY was his targeted victim.

Over a several day period numerous ACDC officials and officials from other agencies set up, approved or agreed to a plan to trap BAILEY in an incriminating act by having the inmate in question hand him $500 in cash. BAILEY was supposed to take the money as proof that he participated in the escape attempt. (The Defendants ignored the fact that BAILEY was required by Florida law, ACDC

regulations and training to seize the money which was illegal contraband in the inmate's possession.) ALLISON's office was established as the headquarters of this operation, and CALDWELL and HAYES approved the activities.

BAILEY seized the money and within 4 to 9 minutes was arrested at about 6:30 A.M. on the morning of May 14, 1987. Although knowledge of this point is not essential to this particular petition, BAILEY was never prosecuted on the charges upon which he was arrested (i.e. aiding jail break) and all charges against him were ultimately dropped. From the beginning BAILEY maintained innocence.

The foregoing records show that what happened to BAILEY, including all the wrongful personnel actions, were deliberately planned and did not occur spontaneously. As a part of the plan ALLISON, with CALDWELL's and HAYES'

approval, wrote BAILEY a letter dated May 13, 1987 (the day before the arrest) stating that BAILEY was suspended without pay as of 7:00 A.M. on May 14, 1987 and informing him that he had 15 days to restore the "prerequisites" of his office. This letter was hand delivered to BAILEY on the morning of May 14, 1987 shortly after he was arrested. Alachua County stopped BAILEY's pay as of 7:00 A.M., May 14, 1987 and he has never again been paid beginning with that date. Nor has BAILEY ever had notice or a hearing pertaining to these matters, except in this and related litigation.

On May 26, 198, ALLISON without prior notice to BAILEY or a hearing wrote BAILEY a second letter stating "effective today you are placed on suspension without pay until further notice." (e.s.) CALDWELL and HAYES approved this letter.

All criminal charges against BAILEY

were dropped on November 19, 1987. By letter of that date, BAILEY wrote CALDWELL and asked to be reinstated with back pay, or for a hearing if his request was denied, or for information about how to make a request for hearing if he wasn't doing it correctly. CALDWELL did not reply, but gave BAILEY's letter to ALLISON. On December 7, 1987, ALLISON wrote BAILEY denying his requests for reinstatement and hearing. CALDWELL and HAYES approved this letter. More than seven months later, BAILEY was finally ordered back to work on June 21, 1988. In the meantime BAILEY had sought psychiatric treatment for severe psychiatric damage the acts of various Defendants had caused, and he was unable to and has never been able to return to regular duty because of these severe psychiatric injuries. His treatment included an extended stay in a secured psychiatric unit of the University

of Florida Shands Teaching Hospital in the summer of 1988. The unrefuted evidence is that these injuries were caused by the various acts Petitioners and other Defendants took against him.

BAILEY brought a 42 U.S.C. §1983 action against Petitioners and other Defendants. Against Petitioners, BAILEY claimed, in part, a deprivation of property interests without due process of law as to suspensions without pay and without notice and hearing, first on May 14, then May 26, and again on December 7, and, also claimed constitutional deprivations for failing to provide post-deprivation due process at any time. The District Court dismissed all claims against Petitioners based upon deprivation of property without due process as of the initial peremptory suspension without pay on the morning of May 14, 1987. Claims pertaining to that decision are not an

issue in Petitioners' petition, but are raised in BAILEY's related petition, No. 92-3.

The District Court also dismissed all claims against Petitioner Allison on the grounds of qualified immunity for actions he took after May 14, 1987. (The Court of Appeals reversed that ruling and ALLISON is now a Petitioner on that issue along with CALDWELL and HAYES). During trial CALDWELL and HAYES moved for directed verdicts as to the property deprivation claims against them for actions taken by them after May 14, 1987. This motion was argued extensively after the close of evidence on the seventeenth day of trial (R 40-577, pp. 2-58). The District Court reserved all pending motions and proceeded to conduct a charge conference to discuss a packet of jury instructions that the Court had proposed (R 40-577, 58). This packet included an instruction on

qualified immunity. (Attached as Appendix A. Because this instruction was not given, it is apparently not in the record.) BAILEY objected to the instruction (R 40-577-67), and the District Court thereafter withdrew it stating:

> THE COURT: I'll tell you what. I'm going to take it out. That's part of the thing that I've wrestled with this whole trial. I think really it's probably a matter of law for me to decide, as I've done, and I'm just not ready to make that decision; I can't. We'll address them again. If you get an adverse verdict and if you want to, we'll address this again. But you're going to object?
>
> [Objections made]
>
> THE COURT: Seventeen (i.e., qualified immunity] is out.

(e.s.) Thereafter the District Court instructed the jury on the substantive elements of 42 U.S.C. §1983 liability (R 42-578-pp. 13-17, attached as Appendix B), and submitted to the jury the question of whether CALDWELL and HAYES deprived BAILEY

of property interests in his public employment by not giving him hearings he was entitled to and for continuing to deprive him of his job, his back pay and benefits without authority after all the criminal charges against him had been dismissed (R 45-578, pp. 24, 25).

To that question the jury returned the answer, "Yes." Thereafter, on August 16, 1990, CALDWELL and HAYES each filed renewed Motions Of Directed Verdict Or For Judgment Notwithstanding The Verdict Or Alternatively For New Trial. Petitioners CALDWELL and HAYES again asserted, in part, that the law was not clearly established during the period May 14, 1987 through June 20, 1988 that BAILEY had a right to notice and hearing if he was to be suspended without pay indefinitely. Petitioners presented memoranda re-arguing the issue extensively and BAILEY resisted the motions with arguments.

On March 4, 1991, the District Court denied Petitioners' motions for post-verdict relief on qualified immunity grounds (Appendix C), thereby confirming his earlier ruling that qualified immunity was a question of law and confirming his ruling on that question against these Petitioners. In short, the District Court ruled as, a matter of law, that at all times in question commencing after the initial peremptory suspension of May 14, 1987 the law was clearly established that Petitioners could not suspend BAILEY without pay indefinitely without notice and hearing in the circumstances of this case, which were fully known to the District Court.

In regard to the precise qualified immunity issue Petitioners now raise in this Court, Petitioners appealed the District Court's ruling to the Circuit Court below and raised the issue as stated

and argued in their initial brief as follows:

> 2. As a matter of law, the District Court erred by not granting qualified immunity to CALDWELL and HAYES with respect to the seven month period between the withdrawal of criminal charges and BAILEY's reinstatement.

Brief of Appellees/Cross Appellants NATE CALDWELL and COLLEEN HAYES, pp. vi, 26-32, No. 91-3275, In the United States Court of Appeals for Eleventh Circuit.

In the meantime BAILEY had appealed to the Eleventh Circuit asserting that the District Court had erred to dismiss the due process claims against Petitioners for having preemptorily deprived him of his public employment without notice and hearing and without pay on the morning of May 14, 1987. The Court below denied BAILEY's appeal on this point, 956 F.2d at 1123, and BAILEY has filed a Petition For Writ of Certiorari in this Court, seeking further review. (No. 92-3).

The Court below also denied Petitioners' appeal on the issue they raise here, stating:

> Although the District Court did not explicitly[1] rule on CALDWELL and HAYES' qualified immunity defense, we interpret the District Court's actions as rejecting that defense. Furthermore, we agree that CALDWELL and HAYES are not entitled to qualified immunity for BAILEY's post-deprivation procedural due process claims.

REASONS FOR DENYING THE WRIT

QUESTION I. THE COURT OF APPEALS FOR THE ELEVENTH CIRCUIT APPLIED THE CORRECT STANDARD IN DETERMINING WHETHER THE DEFENSE OF QUALIFIED IMMUNITY WAS PROPERLY DENIED TO PUBLIC OFFICIALS IN CONNECTION WITH AN ALLEGED DENIAL OF PROCEDURAL DUE PROCESS.

Petitioners began their argument with a factual statement that BAILEY perceives

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[1] BAILEY contends that the Court below mispoke when it stated the District Court did not explicitly rule. The Order of March 4, '1991 is an explicit denial. It is true that the District Court gave no reasons in that summary order, but the record is replete with citations of authority and argument that establish that the law was clearly established that BAILEY might not be indefinitely suspended without pay and without notice and hearing on May 14, 1987 and thereafter.

to be a flagrant misstatement of the opinion and holding of the Court below. Specifically, Petitioners state:

> The Eleventh Circuit refused to decide the threshold legal question required by the Supreme Court to be decided in every qualified immunity case: Was the law "clearly established"? Instead, the Eleventh Circuit in this case relegated that legal question to the jury. Precisely the issue that the Court itself must decide in this case -- what process was meaningful and when it was due was dodged by the Eleventh Circuit and erroneously sent back to the jury.

Petitioners' Petition, No. 91-2077, pp. 7,8.

As the Statement of the Case, above, demonstrates, both the District Court and the Court below decided the qualified immunity issue against Petitioners as a matter of law. In brief review: at the charge conference the District Court stated that he deemed the issue to be one of law and that he had decided it against Petitioners. Accordingly, the District

Court withdrew the qualified immunity jury instruction and, thereafter, instructed the jury only on liability questions and not on qualified immunity. The jury returned a verdict against Petitioners on liability (i.e. Petitioners did deprive BAILEY of property without due process of law). Petitioners then moved for judgment notwithstanding the verdict on the ground that they were entitled to qualified immunity as a matter of law. The District Court denied that motion and Petitioners then appealed to the Court below on the ground that they were entitled to qualified immunity as a matter of law. Finally, the Court below denied that precise appeal.

Hence, contrary to Petitioners' statement, the Eleventh Circuit did decide the threshold issue as a matter of law and did not relegate the qualified immunity issue to the jury. Consequently, the

issue Petitioners attempt to have this Court review is not raised by the proceedings below and, consequently, is not a proper subject of review. For that reason alone, this Court should deny the Petition as to Question 1.

It is true that the Court below did remand the case for retrial on the question of liability: that is, the Jury must consider again whether the actions of CALDWELL and HAYES caused BAILEY to be deprived of property interests without due process of law. Nevertheless, the Circuit Court required the retrial, not because of qualified immunity, but because of the improper seating of a juror. (See Petition No. 92-3). In short, it is what Petitioners did, when they did it, and whether what they did unconstitutionally deprived BAILEY of property interests that the jury must decide anew. The Courts below settled <u>as a matter of law</u> that if

Petitioners in fact acted wrongfully, then qualified immunity does not shield them from liability.

Furthermore, in challenging qualified immunity as applied by the Court below, Petitioners failed to explain in their Petition that the Circuit Court's opinion was divided into two main sections, (A) BAILEY's Appeal; 956 F.2d 1119-1125, and (B) CALDWELL and HAYES' Appeal, 956 F.2d 1125-1127. The Court below explained the standard for qualified immunity under its discussion of BAILEY's Appeal and understandably did not repeat that explanation in the portion of the opinion pertaining to Petitioner's appeal. In discussing BAILEY's appeal, the Court stated:

> To defeat a qualified immunity defense, BAILEY was required to show that the Defendants violated a clearly established statutory or constitutional right of which a reasonable person would have known. [citations omitted]. In deciding whether a constitutional right

> is clearly established, we must judge the contours of the law at the time the employment decision was being made, irrespective of subsequent developments in the law. Thus, public officials are charged with keeping abreast of the current state of the law, not anticipating changes. Whether the law is "clearly established" is a question of law under review de novo.

956 F.2d at 1123. Having stated the qualified immunity standard in BAILEY's appeal, the Court below turned its attention to CALDWELL and HAYES' appeal in Part B and, without restating the standard of review, concluded, "Furthermore, we agree that CALDWELL and HAYES are not entitled to qualified immunity for BAILEY's post-deprivation procedural due process claims." 956 F.2d at 1126.

Petitioners are disingenuous to suggest that the Court below applied one legal standard to the qualified immunity issue in BAILEY's appeal and then applied a drastically different standard a few pages later in CALDWELL and HAYES' appeal.

What it is not disingenuous to suggest is that the Court below perceived that the law was so well settled on May 14, 1987 and thereafter that BAILEY might not be indefinitely deprived of his property interests in his job without pay and without notice and hearing, that it did not deem the matter worthy of extended discussion.

For these reasons, the Petition should be denied.

QUESTION II. THIS CASE RAISES NO ISSUE OF WHETHER A PUBLIC OFFICIAL'S DEFENSE OF QUALIFIED IMMUNITY SHOULD BE SUBMITTED TO A JURY WHEN IT CANNOT BE RESOLVED BEFOREHAND BY A MOTION FOR SUMMARY JUDGMENT BECAUSE OF DISPUTED FACTS.

This Court should deny the Petition For a Writ to review Question 2 because the facts and proceedings in this case do not raise the issue presented in the question. (Indeed, the Petition plainly attempts to employ this case as a vehicle to obtain this Court's review of the Eleventh Circuit's decision in Ansley v.

Henrich, 925 F.2d 1339 (11th Cir. 1991).) (See Petition, pp. 14-19.) First, this case presented no undisputed facts pertaining to the qualified immunity issue; and, second, the law is settled that the issue of qualified immunity is a question of law and not a question of fact to be submitted to the jury under the test of reasonableness as requested by Petitioners in this case. (See Petitioners' requested jury instructions, Petition No. 91-2077, pp. 81a, 82.)

First, there were no disputed facts pertaining to the qualified immunity issue. It is undisputed that BAILEY was a permanent public employee at all times in question. Moreover, the law was well settled by numerous decisions issued by this Court long before May 14, 1987 that permanent public employees, such as BAILEY, possess property interests in their jobs. It was equally well settled

that these property interests may not constitutionally be deprived without due process of law, which requires as a minimum notice and an opportunity to be heard. See, e.g., Board of Regents v. Roth, 408 U.S. 364 (1972) and Perry v. Sinderman, 408 U.S. 593 (1972). Moreover, in 1985, two years before these events, this Court gave specific guidance to officials such as Petitioners as to how to proceed when exigent circumstances required quick decisions; namely, "in those situations where the employer perceives a significant hazard in keeping the employee on the job, it can avoid the problem by suspending with pay." (e.s.) Cleveland Board of Education v. Loudermill, 470 U.S. 532, 545 (1985). In fact, however, there were no pressing or unanticipated circumstances in this case, and none requiring quick action. As the facts presented in the Statement Of The

Case demonstrate, every action Petitioners took (including the initial May 14, 1987 suspension without pay) was deliberately planned and executed.

Moreover, there is no dispute that Petitioners peremptorily suspended BAILEY without pay and without notice or hearing on three separate occasions: May 14, 1987, May 26, 1987, and December 7, 1987. It is also undisputed that Petitioners never at any time gave BAILEY notice and hearing and have never paid him since 7:00 A.M., May 14, 1987. In sum, this case involved no disputed facts that needed to be settled before the District Court decided as a matter of law that the law pertaining to what process is due before depriving public employees of their jobs was well settled at all these times and that reasonable officials in Petitioners' places and under these circumstances knew or should have known their actions

violated BAILEY's clearly established rights. For this reason, the Petition to issue a writ to review Question 2 should be denied.

In a second argument, Petitioners request this Court to accept review of this case to decide whether or not governmental officials are, in effect, to be given two bites at the qualified immunity apple. Petitioners seek a rule that, first, the District Court must decide whether the rights in question were clearly established at the time in the circumstances, and, if they were, then to resubmit to the jury the question of whether Defendant officials acted reasonably under the circumstances in violating the clearly established rights. Petitioners express their view as follows:

> In other words if there could have been a finding that these public officials, in the light of the information they possessed at the time, could reasonably have believed that their failing to provide BAILEY

> with a hearing was not unlawful, then the officials would have been immune from liability.

Petition No. 91-2077, p.15. See also Petitioners' proposed jury instructions, Petition No. 91-2077, pp. 81a, 82a.

This assertion is of itself merely an unexceptional paraphrase of the seminal holding in Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), wherein this Court laid down the prevailing objective standard of qualified immunity, as follows:

> We therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

102 S.Ct. at 2738. See also Anderson v. Creighton, 483 U.S. 635, 107 S.Ct. 3034, 3040, 97 L.Ed.2d 523 (1987). In applying the standard of objective reasonableness in Anderson v. Creighton, this Court made

plain that an official need not necessarily be right to be immune, 102 S.Ct. at 3042, and that the evaluation of whether a claimed right was clearly established must consider the factual context in which a right is claimed. 107 S.Ct. at 3040. As elaborated in Hunter v. Bryant, __U.S.__, 112 S.Ct. 534, 116 L.Ed.2d 589 (1991), "the Court should ask whether the agents acted reasonably under settled law in the circumstances," 112 S.Ct. at 537 (e.s.). Furthermore, this Court has repeatedly stated that the entire evaluation is a purely legal question, Siegert v. Gilley, __U.S.__ 111 S.Ct. 1789, 1793, 114 L.Ed.2d 277 (1991) and, that it should be decided by a court (long before trial if possible) and not by a jury. Hunter v. Bryant, __U.S.__, 112 S.Ct. 534, 537, 116, L.Ed. 589 (1991).

In the context of this case, what Petitioners ask this Court to do is to

prescribe a rule of law that permits juries to override the legal decisions of the District Courts on the question of whether the "agents acted reasonably under settled law in the circumstances" of the particular case, Hunter v. Bryant, with a subsequent supervening second determination of the exact same issue. In other words, Petitioners advance a rule that would permit a jury to determine that the District Court's determination that a reasonable defendant in the particular circumstances should have known that its acts would violate clearly established rights was itself an unreasonable determination. This proposition is antithetical to this Court's precedents on qualified immunity and to any basic notice of fair play. Petitioners wish to submerge the fact that the fundamental purpose of 42 U.S.C. §1983 actions is to vindicate the constitutional rights of

citizens injured by wrongful acts of public officers and employees. The basic question is whether the charged agents caused the Plaintiff to be deprived of constitutional rights. Although this Court has judicially acknowledged immunities to protect erring officials whose conduct in the circumstances satisfies the objective reasonableness standard, it has done so because the public interest requires it, and not because erring officials have some sort of overarching individual right not to be held liable that prevails over the constitutional rights of injured citizens.

BAILEY respectfully asserts that one bite at the qualified immunity apple is enough. On that one bite, the courts below applied this Court's precedents properly and decided as a matter of law that Petitioners did not act reasonably <u>in the circumstances</u> in the light of clearly

settled law. For this reason, this Court should deny the Petition.

Finally, BAILEY acknowledges that cases may arise in which a District Court cannot determine the true state of facts that constitutes "the circumstances." For example, if at summary judgment in a police shooting case, the Plaintiff presents an affidavit that he was lying spread eagle supine on the ground with empty hands in broad daylight when the officer stood over him and shot him in the chest, and the Defendant officer presents an affidavit that the Plaintiff was standing in a crouch in subdued light and shooting a revolver straight at him, the District Court will be unable to decide the qualified immunity question at that point. If the true facts are as Plaintiff states them, the Defendant is not immune; if they are as the Defendant states them, immunity should be granted.

BAILEY readily agrees that a factual dispute such as the foregoing hypothetical would require a jury determination of the true facts before the Court could decide the qualified immunity question in the true circumstances.[2] In such a case, the District Court would be required to decide whether to employ special interrogatories, special verdicts, or some other approved technique to obtain the jury's verdict as to what are the true specific contextual facts. Such a case may also present an occasion for this Court to decide whether one approach is to be used to the exclusion of others. This case, however, presents no such occasion because no dispute exists as to the true contextual

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[2] BAILEY strongly rebukes Petitioners' suggestion that a Defendant should always win as a matter of law whenever the true facts about the circumstances are in dispute. See Petitioners' Petition No. 91-2077, p. 13, footnote. Such a rule elevates official immunity to a status far superior to constitutional rights. It would also mean that an official could always assure immunity by lying about the true facts.

facts. For this reason, the Petition should be denied.

CONCLUSION

The Courts below were cognizant of and applied the correct principles of qualified immunity to the procedural due process violations BAILEY claims Petitioners committed against him during the thirteen months following the initial peremptory suspension without pay, notice and hearing that occurred on May 14, 1987. Contrary to Petitioners' assertions in Question 1, the Courts below did not submit the issue of qualified immunity for jury determination in the trial that has been held, nor did the Circuit Court instruct the District Court to submit the issue to jury determination in the retrial on remand. Instead, the Court below affirmed the District Court's ruling that, as a matter of law, Petitioners were not entitled to qualified immunity under

settled law in the circumstances of this case. For these reasons, this Court should deny the Petition For a Writ to review Question 1.

In Question 2, Petitioners assert, in effect, that once a District Court decides, under settled law and in the circumstances of the case, that the actions of the Defendants were not entitled to qualified immunity because their actions did not satisfy the objective reasonableness standard, the Court must thereafter resubmit the same issue to a jury to reconsider the reasonableness in the circumstances issue. This point is thoroughly repudiated by stable precedents of this Court. Accordingly, this Court should deny the writ.

In Question 2, Petitioners also assert that this Court should issue a writ to consider how District Courts should

employ juries to ascertain the true facts when disputes exist as to what were the true contextual circumstances actually confronting the parties. As BAILEY has shown, no facts pertaining to the circumstances are in dispute in this case. Consequently, this case does not present a proper occasion to review the issue and, accordingly, this Court should deny the Petition.

Respectfully submitted,

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APPENDIX A

DISTRICT COURT'S EXCLUDED QUALIFIED IMMUNITY JURY INSTRUCTION

Under the doctrine of "qualified immunity," government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. The right the official is alleged to have violated must have been clearly established in a more particularized, and hence more relevant, sense: the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. The standard is an objective one, and therefore does not include an inquiry into the officer's subjective intent or beliefs. In sum, qualified immunity protects all but the plainly incompetent or those who knowingly violate the law.

The test for qualified immunity is as

follows:

1. The defendant government official must first prove, by a preponderance of the evidence, that he or she was acting within the scope of his discretionary authority when the allegedly wrongful acts occurred.

2. Once the defendant government official proves that he or she was acting within the scope of his or her discretionary authority, the burden shifts to the plaintiff to show lack of good faith on the defendant's part. Plaintiff's burden is met by proof demonstrating that the defendant public official's actions violated clearly established constitutional law.

APPENDIX B

EXCERPTS FROM JURY INSTRUCTIONS GIVEN BY DISTRICT COURT

Now in order to prove a violation of 42 United States Code, Section 1983, the Plaintiff must prove by a preponderance of the evidence each of the following facts; first, that the Defendants intentionally committed acts which violated one or more of the Plaintiff's Federal constitutional rights which I have previously mentioned to you; second, that in so doing, the Defendants acted under color of the authority of the State of Florida; and third, that the Defendants' acts were the approximate or the legal cause of the damages sustained by the Plaintiff.

A state or local official acts under color of the authority of the state, not only when he acts within the limits of his lawful authority, but also when he acts without or beyond the bounds of his lawful authority, in order for unlawful acts of an official to be done under color of state law; however, the unlawful act must

be done while the official is purporting to act in the performance of his official duty, that is, the unlawful act must be an abuse or misuse of power which is possessed by the official only because he is an official.

Not to be deprived of a property or liberty interest without due process of law means to be deprived of a property or liberty interest without authority under the law. And before you can decide then whether or not Plaintiff was deprived by a Defendant of a property or liberty interest without due process of law, you must first decide from a preponderance of the evidence, whether the Defendant committed the act claimed by the Plaintiff, and if so, whether the Defendant was acting within or beyond the bounds of his or her lawful authority under state law.

Now if the defendant acted within the

limits of his or her lawful authority under state law, then the Defendant could not have deprived Plaintiff of any right without due process of law. Now a county government may only be held liable for deprivation of constitutional rights which are the results of unconstitutional governmental policies. Since governmental bodies can act only through natural persons, the county government may be held liable when an only when its official policies cause its employees to violate another person's constitutional rights. It is for you, the jury, to determine whether their decisions have caused the deprivation of rights and issues by policies that command that deprivation occurred.

Now you are further instructed that in determining whether any Defendant is liable under Title 42 United States Code, Section 1983, for depriving the Plaintiff

of a constitutional right you are to consider only the action or inaction of each named Defendant and not that of any other person concerning whom you may have heard testimony. Each Defendant is liable only for his or her actions or for those of other persons that he or she personally directly approved or in whose conduct he or she knowingly acquiesced.

Personal involvement of supervisory officials is a touchstone of their liability. They are not liable for civil rights violations, simply because of the actions of their support. Thus, to meet his burden of proof of personal involvement by these Defendants, Plaintiff must prove as to each, not only that his rights or rights as set forth above are violated, but also that the injuries resulted from such violation or violations were caused personally by that Defendant or at his or her personal direction or

that he or she knowingly acquiesced in acting, causing that injury.

Personal participation in the immediate act is not required. It is sufficient if the Defendant intentionally set in motion or knowingly refused to terminate a series of acts by others which he knew or reasonably should have known would cause the proscribed injury to the Plaintiff. Now if any injury or damage is legally caused by an act or a failure to act, whenever it appears from the evidence in the case that the act or the omission played a substantial part in bringing about or actually causing the injury or damage, and that the injury or damage was either a direct result or a reasonably probable consequence of the act or the omission. Now if you should find in favor of the Defendants of each and every claim, you need not consider damages. If on the other hand, you should find that Plaintiff

has proven each essential element of any given claim, then you must determine what damages, if any, are owed to the Plaintiff because of that Defendant's constitutional violation.

APPENDIX C

DISTRICT COURT ORDER
OF MARCH 4, 1990
DENYING PETITIONERS MOTIONS
FOR POST-VERDICT RELIEF

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
GAINESVILLE DIVISION

Case No. GCA 88-10198-MMP

GREGG FITZGERALD BAILEY and
LIZZIE SHIRLEY BAILEY,

v.

BOARD OF COUNTY COMMISSIONERS OF
ALACHUA COUNTY, FLORIDA, et al.,

Plaintiffs,

v.

BOARD OF COUNTY COMMISSIONERS OF
ALACHUA COUNTY, FLORIDA, et al.,

Defendants

ORDER

[Filed Mar. 4, 1991]

This cause is before the court on various outstanding motions. Plaintiff's motion for Judgment Notwithstanding the Verdict (Doc. 482) is DENIED; Defendant Caldwell's renewed motion for Directed Verdict, Judgment Notwithstanding the Verdict, and for a New Trial (Doc. 485), is DENIED; Defendant Hayes' renewed motion for Directed Verdict, Judgment Notwithstanding the Verdict, and for a New Trial (Doc. 487). is DENIED. The following motions will be ruled on by separate order:

(1) City's motion for attorneys' fees (Doc. 505).

(2) City's motion for costs (Doc. 506).
(3) Plaintiff's motion to strike City's motion for costs (Doc. 521).
(4) County's motion to tax costs (Doc. 523).
(5) Joinder of defendant's Garrahan, Brown, Strauss and Allison in County's motion to tax costs (Doc. 522).
(6) Motion to tax costs by defendants Hindery and Cole (Doc. 524).
(7) Defendant Tileston's motion for costs (Doc. 527).
(8) Plaintiff's motion to strike Tileston's motion for costs (Doc. 543).
(9) City's motion to require plaintiffs to post bond (Doc. 545).

DONE AND ORDERED this 1st day of March, 1991.

/s/ Maurice M. Paul
United States District Judge